BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CLIFFORD D. SLOCUM Claimant VS. **GRAF ELECTRIC, INC.** Respondent AND **AETNA CASUALTY & SURETY** Insurance Carrier	)	Docket No. 173,956

ORDER

ON the 10th day of May, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of an Award dated February 7, 1994, and a Nunc Pro Tunc Award dated February 9, 1994 entered by Special Administrative Law Judge William F. Morrissey came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney Roger C. Kidd of Wichita, Kansas. The respondent and insurance carrier appeared by and through their attorney Edward D. Heath of Wichita, Kansas. There were no other appearances.

RECORD

The record reviewed and considered by the Appeals Board is the same as that set forth in the Award of the Special Administrative Law Judge dated February 7, 1994.

STIPULATIONS

The Appeals Board adopts the stipulations as set forth in the Award of the Special Administrative Law Judge.

ISSUES

The Special Administrative Law Judge found that claimant was entitled to permanent partial general disability benefits based upon a thirty-eight percent (38%) work disability. The respondent and insurance carrier request the Appeals Board to review that finding. The sole issue before the Appeals Board is nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds, as follows:

(1) For the reasons expressed below, the Award of the Special Administrative Law Judge should be modified to grant claimant permanent partial general disability benefits based upon a twenty-nine percent (29%) work disability.

Claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on November 15, 1991, when he injured his right shoulder while drilling through a sill plate. Claimant continued to work until his symptoms worsened and required him to report to a hospital emergency room. The emergency room physician took claimant off work for ten (10) days and referred him to board certified orthopedic surgeon, George L. Lucas, M.D. for treatment. Dr. Lucas' preliminary diagnosis was brachial plexus stretch for which he provided conservative care. After treatment, Dr. Lucas' diagnosis remains brachial plexus stretch and believes that claimant has experienced a four percent (4%) impairment of function to the body as a whole as a result of this injury. At his attorney's request, claimant saw board certified general surgeon, Kenneth W. Hollis, M.D., for evaluation. Dr. Hollis' diagnosis is brachial plexus stretch coupled with myofacial syndrome. Dr. Hollis also believes that claimant has experienced a four percent (4%) permanent partial impairment of function to the body as a whole as a result of his work related injuries.

During his treatment, claimant was taken off work for a total of twenty (20) days. Despite his injuries, claimant continued to work for the respondent until being laid off, along with others, on February 22, 1992. Claimant's testimony is uncontroverted that during the period between his accident and layoff he was unable to perform all of his work duties and received significant help from other employees. At the time of regular hearing, claimant had been unable to find employment and was drawing unemployment benefits. Claimant testified that he had applied at numerous potential employers and was looking for work in the fast food industry as well as looking for positions as a courier, forklift driver, or package delivery person.

Claimant's right shoulder injury has limited his ability to lift and perform work overhead. Claimant testified that his symptoms increase with weather changes and that

driving for long periods causes difficulties. Somewhat reluctantly, Dr. Lucas testified that claimant would experience difficulties working with his hands over his shoulders and that activity could be troublesome; that claimant should not frequently lift thirty (30) pounds or greater above his head, but that claimant could lift upwards of fifty (50) pounds above his head four (4) or five (5) times per hour. Dr. Lucas also believes that claimant could lift up to fifteen (15) pounds overhead on a frequent basis. At the other extreme, Dr. Hollis freely provided his opinion regarding work restrictions and limitations and opined that claimant should never reach above his shoulder; that he can lift one (1) to ten (10) pounds on a continuous basis; that he can lift ten (10) to twenty (20) pounds on a frequent basis; and that he should not ever lift over twenty-five (25) pounds. Dr. Hollis also believes that claimant should limit his pushing and pulling to an occasional basis.

Labor market expert Jerry D. Hardin testified for the claimant and provided his opinion that claimant has lost 70-75% of his ability to access the open labor market and twenty-one percent (21%) of his ability to earn a comparable wage when considering the restrictions of Dr. Hollis. Although the deposition of Dr. Lucas had been taken, no questions were asked regarding the loss of labor market or ability to earn comparable wage should one consider the opinions of Dr. Lucas as expressed in his deposition.

At the deposition of Dr. Hollis, claimant's counsel characterized his client's injury as being something other than major, and the doctor agreed. This testimony, coupled with claimant's description of his limitations due to this injury, causes the Appeals Board to conclude that claimant's work restrictions and limitations are actually less than the restrictions provided by Dr. Hollis. The Appeals Board finds that work disability is appropriate as claimant returned to work for the respondent after his accidental injury and worked at a comparable wage only due to accommodation from fellow workers. Although the Appeals Board feels that claimant's loss of ability to perform work in the open labor market and earn comparable wage should be determined by taking into consideration Dr. Lucas' restrictions and limitations, the record does not contain that opinion. With the evidence now before this Board, the highest conceivable loss of ability to return to the open labor market is 70-75% if limited to the restrictions set forth by Dr. Hollis. At the other extreme, the lowest loss of ability to perform work in the open labor market is zero percent (0%) if one assumes that there are no restrictions upon claimant's return to work, or that the restrictions and limitations expressed by Dr. Lucas would have little or no effect upon claimant's abilities. Due to the state of the record, the Appeals Board finds that it is proper, in this instance, to average the highest and lowest percentages of potential loss to determine claimant's loss of his ability to perform work in the open labor market. Such computation yields a loss of thirty-six percent (36%). The Appeals Board agrees with the opinion of Mr. Hardin and finds that claimant has lost twenty-one percent (21%) of his ability to earn a comparable wage. Prior to his accidental injury, claimant earned approximately $280.00 per week. Post injury, claimant retains the ability to earn approximately $220.00 per week. We do not consider it necessary to average the opinion from Hardin regarding wage loss with a 0% loss, because the projected wage loss of 21% appears reasonable under the facts of this case and we do find a loss of labor market access as a rsult of these injuries.

The ultimate decision concerning the nature and extent of the disability is for the trier of fact. As the Kansas Court of Appeals decided in Tovar v. IBP, Inc., 15 Kan. App. 2d, 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991), it is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and others in making a determination

on the issue of disability. The Appeals Board finds that claimant's work disability is twenty-nine percent (29%) which is the rounded mean of claimant's loss of ability to perform in the open labor market and loss of ability to earn a comparable wage as found above.

Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), requires the Appeals Board to consider both the reduction of a claimant's ability to perform work in the open labor market and the ability to earn comparable wage. In order to express permanent partial general disability in a percentage, a mathematical equation or formula must necessarily be utilized. Hughes, supra; and Schad v. Hearthstone Nursing Center, 16 Kan. App. 50 816, P.2d 409 (1991). As there appears to be no reason why one factor should be given greater weight than the other in this instance, the Appeals Board finds that it is appropriate to average them.

(2) The Appeals Board adopts the findings and conclusions expressed by the Special Administrative Law Judge in his Award of February 7, 1994 and Nunc Pro Tunc Award dated February 9, 1994, that are not inconsistent with the findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award and Nunc Pro Tunc Award dated February 7, 1994 and February 9, 1994, respectively, should be, and hereby are, modified to award claimant benefits based upon a permanent partial general disability of twenty nine percent (29%); that all other orders set forth in the Award and Nunc Pro Tunc Award of the Special Administrative Law Judge are hereby adopted by the Appeals Board and incorporated herein by reference as if fully set forth.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE, WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Clifford D. Slocum, and against the respondent, Graf Electric, Inc., and the insurance carrier, Aetna Casualty & Surety Company for an accidental injury which occurred on November 15, 1991 and based on an average weekly wage of $280.00, for 1.86 weeks of temporary total disability compensation at the rate of $186.68 per week in the sum of $347.22 and 413.14 weeks of compensation at the rate of $54.14 in the sum of $22,367.40 for 29% permanent partial general body work disability making a total award of $22,714.62.

As of November 1, 1994, there is due and owing claimant 1.86 weeks temporary total compensation at $186.68 per week in the sum of $347.22 plus 152.85 weeks permanent partial compensation at $54.14 per week in the sum of $8275.30 for a total due and owing of $8,622.52.

The remaining balance in the amount of $14,092.10 shall be paid at $54.14 per week for 260.29 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Roger C. Kidd, Attorney at Law, 250 N. Water, Suite 215, Wichita, KS 67202
Edward D. Heath, Jr., Attorney at Law, PO Box 95, Wichita, KS 67201-0095
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director